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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

23 Cr. 430 (KPF)

5 ROMAN STORM,

6 Defendant.

7 -----x

8 November 30, 2023

9 3:25 p.m.

10 Before:

11 HON. KATHERINE POLK FAILLA,

12 U.S. District Judge

13
14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

BY: THANE REHN

18 BEN ARAD

Assistant United States Attorneys

19 WAYMAKER LLP

Attorneys for Defendant

20 BY: BRIAN E. KLEIN

21 KERI AXEL

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(Case called)

MR. REHN: Good afternoon, your Honor. Thane Rehn and Ben Arad for the United States, and we are joined at counsel's table by Elizabeth Kudirka and Halie Richins from the Federal Bureau of Investigation.

THE COURT: Thank you all very much. Good afternoon to you all. Thank you.

Sir.

MR. KLEIN: Good afternoon, your Honor. Brian Klein. With me is my colleague Keri Axel, who is going to be submitting her *pro hac vice* application.

THE COURT: Not yet, huh?

MS. AXEL: We just realized it was in my inbox so I have not been approved.

THE COURT: Oh. I can't sign what I haven't seen, so yes.

MS. AXEL: I apologize, your Honor.

THE COURT: All right. I now know where it is. Thank you.

And Mr. Storm, good afternoon to you as well.

THE DEFENDANT: Good afternoon.

THE COURT: Thank you. Please, be seated.

Mr. Rehn, should I be directing questions to you or Mr. Arad this morning?

MR. REHN: You can direct questions to me, your Honor.

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1 THE COURT: Thank you.

2 Since last we saw each other, what productions has the
3 government made in terms of both quantum of data but also if
4 you can give me a sense of the percentage of Rule 16 discovery
5 that's been completed?

6 MR. REHN: Yes, your Honor.

7 In terms of the quantum of data, as I think I
8 mentioned before at our first conference, we estimated data
9 production in the terabytes. I think we have lived up to that.
10 It's been at least one or two terabytes of data which has
11 included all of the subpoena returns that were in the
12 government's custody at the time the case was charged; it
13 includes returns from Mutual Legal Assistance Treaty that
14 basically included a search, that was conducted by another
15 country, of a cell phone belonging to an alleged
16 co-conspirator; search warrant returns from Google; from a
17 company called Discord; from companies called DigitalOcean and
18 GitHub.

19 THE COURT: Just one moment, please, sir. Thank you.

20 MR. REHN: iCloud reports --

21 THE COURT: No, no. One moment. I want to make sure
22 I am writing down what you are telling me. Please continue.
23 Thank you.

24 MR. REHN: I think that's the primary type of material
25 we have produced. We have also produced full forensic images

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1 of the devices that were seized from the defendant's residence
2 at the time of his arrest. What hasn't been produced yet are
3 primarily the responsive materials from those devices.

4 THE COURT: I want to make sure I understand what you
5 are saying. So let's just say it is a cell phone, smart phone,
6 for example. You have produced an image of the phone with
7 everything on it, so to the extent Mr. Storm wanted to go
8 looking through that image he could look for everything, but in
9 terms of identifying what in particular the government believes
10 to be Rule 16 material, that's what you are in the process of
11 doing now.

12 MR. REHN: That's correct, your Honor.

13 THE COURT: I understand that, sir.

14 MR. REHN: So, the case agents have been conducting
15 that review since the time of the arrest. Obviously it is a
16 process that includes --

17 THE COURT: A terabyte of information.

18 MR. REHN: -- getting the agent to review it so it is
19 a time consuming process. I have spoken with them before
20 today's proceeding about the time estimate on completing that
21 process and we are very hopeful it will be done by the end of
22 the year, which is about a month from now.

23 THE COURT: About. Yes. OK.

24 MR. REHN: So, at that point, essentially discovery
25 will be complete.

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1 THE COURT: One moment, please.

2 Apart from reviewing the images of the devices, are
3 there, for example, outstanding subpoenas or MLATs or anything
4 else that you currently expect to receive materials from?

5 MR. REHN: I don't believe so. The agent has informed
6 me that there may somebody subpoenas still outstanding. I know
7 we have received recently two subpoena returns which we intend
8 to produce in short order. It sounds like there may be a small
9 number of additional subpoenas still outstanding.

10 THE COURT: Does your end of your benchmark, which I
11 am taking as an end of year commitment, extend to those
12 subpoena returns? For example, they weren't just sent out
13 before this conference, I presume they were sent out days,
14 weeks earlier.

15 MR. REHN: That's correct, your Honor.

16 THE COURT: OK.

17 MR. REHN: So as soon as those returns are produced,
18 we will prepare them for production and produce them. So we
19 are not anticipating extensive additional discovery spilling
20 over extensively into 2024.

21 THE COURT: No, I'm not either. I am expecting by end
22 of year. What else should I know from the government's
23 perspective, sir?

24 MR. REHN: I think in terms of the discovery that is
25 largely the state of play. I should say there are some other

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1 devices that were searched from other individuals which there
2 may still be some review ongoing of those devices as well so it
3 is not just the defendant's devices, we are reading to identify
4 various responsive materials.

5 THE COURT: Your end of year benchmark applies to
6 those as well, sir?

7 MR. REHN: Yes, your Honor.

8 THE COURT: Thank you.

9 And so, from your perspective, by the end of the year
10 the ball is effectively in the court of Mr. Storm in terms of
11 deciding what to do next.

12 MR. REHN: That's correct, your Honor. And I should
13 note that, for example, if there was an interest in filing
14 motions to suppress, the underlying warrants that generated all
15 of this material were produced long ago and he has all of those
16 materials.

17 THE COURT: OK. Thank you.

18 And the government itself is not contemplating
19 affirmative motion practice?

20 MR. REHN: That's correct, your Honor.

21 THE COURT: Thank you.

22 Mr. Klein, shall I be directing my questions to you or
23 Ms. Axel?

24 MR. KLEIN: Yes. Me, your Honor.

25 THE COURT: So you have a lot of materials right now,

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1 I presume. You are getting more in the next 31, 32 days. What
2 do you see as next steps on behalf of your client?

3 MR. KLEIN: Yes, your Honor.

4 So we conferred with the government before coming here
5 about a proposed motion schedule, and as the government
6 mentioned there are terabytes --

7 THE COURT: Terabytes, plural. I thought it was
8 terabyte in the singular. At that level it doesn't matter.

9 MR. KLEIN: More than one terabyte I think is
10 terabytes.

11 THE COURT: OK.

12 MR. KLEIN: Yes, that level it really becomes not so
13 important but, your Honor, do you want me to give the dates we
14 had talked to the government about?

15 THE COURT: I would first like you to outline the
16 motions you intend because I am trying to understand, for
17 example, are you contemplating motions at which there would be
18 witness testimony or a motion for which there would simply be
19 oral argument?

20 MR. KLEIN: At present, your Honor, we are
21 contemplating a motion to dismiss so we would ask --

22 THE COURT: May I ask on what basis?

23 MR. KLEIN: Your Honor, we are still going through
24 that but we think there are legal flaws with the indictment
25 relating to certain of the charges that we wanted to file

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1 motion to dismiss on. One we have thought about already is the
2 unlicensed money transmittal charge.

3 THE COURT: Sir, I am certainly not asking you to
4 divulge your defense to the government, but have you previewed
5 for the government your belief that that charge may have been
6 improperly done? And I am asking because I just want to know
7 whether the government is going to swoop in and supersede and
8 obviate the need for motion practice. That is obviously my
9 optimistic view of things but I don't know if that is
10 something -- I'm not sure if that is something that can be
11 fixed, sir.

12 MR. KLEIN: We previewed with them that they shouldn't
13 have charged our client.

14 THE COURT: Well, that one, yes.

15 MR. KLEIN: We have not gone through with them
16 specifics about the anticipated motioned to dismiss yet.

17 THE COURT: Of course.

18 MR. KLEIN: We plan to do that, your Honor, well in
19 advance of the motion date in case, in my opinion very
20 unlikely, the possibility that they would dismiss a count or
21 choose to supersede.

22 THE COURT: Yes. I understand. OK.

23 Are there other motion to dismiss arguments you are
24 willing to share with me or are they still in formation?

25 MR. KLEIN: Still being formed, your Honor.

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1 THE COURT: Thank you.

2 And are there other motions that you are
3 contemplating, sir; suppression or otherwise?

4 MR. KLEIN: We are considering suppression but I can't
5 say that we have decided to file one, your Honor. Obviously
6 there was a search and seizure here so we are looking at those
7 issues.

8 THE COURT: Yes.

9 MR. KLEIN: We are waiting for the rest of the
10 discovery to come in to see if there were other searches and
11 stuff before we start focusing on one but we will start
12 focusing on it now that we have heard discovery is almost done.

13 THE COURT: Yes.

14 MR. KLEIN: In that case we would be filing in advance
15 of the government to see if they would be willing to not use
16 that evidence. I think that is generally very unlikely.

17 THE COURT: Sometimes it happens, yes.

18 MR. KLEIN: Sometimes, yes. And so, those are our
19 thoughts on motions right now, substantive motions. We are
20 premature for motions *in limine* and other things.

21 THE COURT: Of course. And I imagined you were not of
22 the group that would be to be motion for co-conspirator
23 statements, motion for early disclosure of *Brady*. The sort of
24 menu of motions that I see in some cases whether it is -- not a
25 motion for severance at this point, so I understand that. As I

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1 see them I will resolve them.

2 MR. KLEIN: Perfect. That's what we were hoping for.

3 Your Honor, also, so do you want those dates now?

4 THE COURT: I want the proposed dates, yes.

5 MR. KLEIN: Proposed dates, to be very clear.

6 THE COURT: I am asking for you to be that clear.

7 Thank you, sir.

8 MR. KLEIN: So, we had, based on -- and I will tell
9 you based on the amount of discovery, our own other trial
10 commitments, your Honor, we proposed some dates which they
11 found acceptable. The first one was motions would be filed on
12 March 29.

13 THE COURT: March 29; four months from now March 29?

14 MR. KLEIN: Yes. Your Honor, Ms. Axel and I have a
15 trial currently scheduled for January 16 in L.A. that will be
16 several weeks. That's part of the reason we need more time.

17 THE COURT: I see.

18 MR. KLEIN: In addition, I have another trial here in
19 the Southern District on April 8, and so there is a number of
20 finding dates between those that work that give us the time
21 needed to prepare what we think will be a very substantive set
22 of motions to dismiss. We propose March 29. Again, the
23 government hasn't opposed that. The other suggested date for
24 opposition would be April 26, so the government would have 30
25 days. And then replies would be May 17.

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1 THE COURT: One moment, please. It appears that I am
2 on trial for the entire month of May into June, which I knew.

3 Ms. Noriega, I think -- and recognizing this may bite
4 me at some point -- June 20th at 10:00 a.m. for oral argument,
5 if that works for the parties.

6 MR. KLEIN: One moment, your Honor, with my calendar?

7 THE COURT: Yes.

8 MR. KLEIN: Your Honor, I have a trial in Portland
9 state court, of all places, sometime starting in June and it is
10 not on my calendar for some reason. I am trying to figure out
11 when I am supposed to be there. One second.

12 MR. REHN: Your Honor, that date is actually not --
13 ironically that's the one date in 2024 that is problematic for
14 the government.

15 THE COURT: Because?

16 MR. REHN: Because my kids' school ends on the 18th
17 and we are planning to take the rest of that week on a little
18 family trip.

19 THE COURT: Oh sure. Two or three at this point, sir?

20 MR. REHN: Three, your Honor.

21 THE COURT: Oh, I would ruin three children's lives.

22 MR. REHN: It would be difficult.

23 (Court and deputy confer)

24 THE COURT: As a second attempt at getting it
25 scheduled, June 25 at 11:00?

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1 MR. KLEIN: Your Honor, that works for the defense.

2 MR. REHN: Yes, your Honor.

3 THE COURT: There is a small chance that I would have
4 to be doing attorney admissions at that moment because I'm on
5 Part I duty. If so, we just begin a little bit later. I don't
6 think it would take all morning. So June 25, oral argument.

7 MR. KLEIN: Your Honor, can I raise one point with the
8 motion practice?

9 THE COURT: Sir.

10 MR. KLEIN: We anticipate there will be a number of
11 parties who are in the privacy cryptocurrency advocacy group
12 industries that may want to file amicus briefs in connection
13 with our motion to dismiss. And I followed the Coinbase case
14 closely, your Honor, and I see that you allowed amicus briefs.

15 THE COURT: One week after, I believe.

16 MR. KLEIN: So if there is a schedule now that I could
17 let people know, that would be helpful, if you are willing to
18 entertain amicus brief.

19 THE COURT: I didn't want them in Coinbase. I suppose
20 I shouldn't also disregard them here. But what I do with them
21 is up to me but I at least will receive them. Anyone wishing
22 to file an amicus brief, and perhaps this can go into our
23 minute entry, that anyone wishing to file amicus brief would
24 have to file it within one week of the party whose position
25 they're reporting and not the reply -- I don't want anything

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1 off of the reply date. So, yes, you can tell your friends
2 within a week of yours.

3 MR. KLEIN: Yes, your Honor.

4 THE COURT: I don't know if there will be any amicus
5 briefs coming from the government coming from who knows. I did
6 get some in Coinbase so stranger things have happened.

7 I don't intend, as in Coinbase, I don't intend to have
8 them argue, though.

9 MR. KLEIN: Understand, your Honor.

10 THE COURT: Mr. Klein, I am going to ask this because
11 I ask this in almost every case: We are having motion
12 practice, yes?

13 MR. KLEIN: Yes.

14 THE COURT: You don't contemplate, for example, a
15 pre-motion resolution of this case?

16 MR. KLEIN: No, your Honor.

17 THE COURT: That's fine. I need to know how real this
18 is. These are real.

19 MR. KLEIN: Very real, your Honor, in our mind, unless
20 the government dismisses the case which I don't believe.

21 THE COURT: Which is not happening. Yes. OK. Thank
22 you.

23 Mr. Klein, am I also setting a trial date?

24 MR. KLEIN: Your Honor, we are not asking you to set a
25 trial date at this time. We had given thought to a trial date

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1 possibility.

2 THE COURT: OK.

3 MR. KLEIN: But we had related that to the government
4 and they had their own view on this, I guess.

5 THE COURT: Well, what was your view?

6 MR. KLEIN: Our view was September 23rd, or the
7 soonest date thereafter, that is convenient for the Court based
8 on the motion schedule, etc.

9 THE COURT: Mr. Rehn, I assume the government is not
10 amending the motion schedule that I just effectively endorsed.
11 What is the government's view with respect to an appropriate
12 trial date?

13 MR. REHN: Your Honor, what we had told the defense is
14 we would hope for a trial date as soon after the motion
15 schedule as the Court is available, but if September 23rd is
16 the soonest available date, the government is amenable to that
17 date.

18 THE COURT: Let me just spitball for a moment, please.
19 I do not have trials currently in the month of July. I do have
20 them in, for a substantial chunk of June up until basically the
21 oral argument date, and for all of May. I don't have them in
22 August and I have had perfectly fine results, surprisingly fine
23 results with the jury trials I have had in August. I have now
24 had two and I thought they would be problematic and they
25 weren't. I have time in August. I have time in September. If

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1 the parties feel, for example, that the jury might not be as
2 engaged in August as they might be in September, I would listen
3 to you. I am just telling you, though, that I have now had, in
4 the last two years, August trials that were fine. But
5 Mr. Klein, you are shaking your head. So?

6 MR. KLEIN: Your Honor, we will need a substantial
7 amount of time to prepare for trial after the motions, which
8 may shape some of the issues we are dealing with. And also, I
9 have a concern about August, generally. In addition, of
10 course, although I only have two children, I have a preplanned
11 family vacation already for parts of August and late July, so
12 it would be only ruining two children's part of their summer.

13 THE COURT: Still, I would be ruining two children's
14 part of their summer.

15 MR. KLEIN: So we were looking on a date that made
16 sense based on the level of work needed to prepare and be ready
17 for trial, also the fact you having to decide these motions
18 given your Honor's time. We are hopeful, of course, that we
19 will win them, but even if we lose, sometimes your Honor has a
20 ruling that gives us a lot of guidance that will shape our
21 trial strategy. So we thought, based on all of those concerns,
22 September 23rd was a fine date to do it.

23 THE COURT: How long do the parties see this going?
24 Is this a four-week trial? A three-week trial?

25 MR. REHN: I think the government's case is going to

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1 be in the neighborhood of two weeks.

2 THE COURT: And there may be a defense case so I
3 should leave a week for the defense case.

4 MR. KLEIN: I think a week is fair, your Honor; yes.

5 THE COURT: So that would be the weeks of September
6 23rd, September 30th, and October 7th?

7 I am advised by my deputy that there may be holidays
8 during that time period so I don't know how the parties want to
9 accommodate that. I guess -- one moment, please.

10 (Court and deputy confer)

11 THE COURT: My deputy advises me that there are
12 holidays October 3rd and October 11; October 3rd would suggest
13 that we be not hearing evidence on that day. The 11th, for all
14 I know we could be done by that point. So I think we go
15 forward but I will hear from the parties if they hold a
16 different view.

17 MR. REHN: I think that's right, your Honor. The
18 11th, I believe, is when Yom Kippur begins.

19 THE COURT: Yes.

20 MR. REHN: But that begins in the evening and that's
21 Friday, so if we were to end the day sort of in the
22 mid-afternoon.

23 THE COURT: My day ends at 3:30 so.

24 MR. REHN: That shouldn't interfere with --

25 THE COURT: Right. And if it does, then we will break

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1 early. I'm not going to inconvenience anyone or impinge on
2 their religious observances. So I think if we are doing a fall
3 trial we can't help but to hit some holiday at some point so I
4 think that's fine. We will block these three weeks.
5 Understand, please, that you should be receiving a trial order
6 from me. Imagine that four weeks before the trial date
7 proposed voir dire, proposed request to charge, proposed
8 motions *in limine* would be due about three weeks before the
9 trial date; your opposition to any motions *in limine* would be
10 June; about two weeks before the trial date we would have a
11 final pretrial conference; and then there would be the trial
12 date. We will figure out those dates again by looking at my
13 schedule but we will issue a written trial order on that front.
14 I am very much getting ahead of myself here but my day is 9:00
15 to 3:30 with very abbreviated breaks and shortened lunch for
16 work and child care issues of my jurors.

17 Other things we should be talking about then? Sir?

18 MR. KLEIN: Your Honor, we obviously are going to
19 request 3500 -- maybe this isn't obvious -- but in advance of
20 the trial.

21 THE COURT: I usually order it a week in advance of
22 trial, sir, but in this case, given the length of time, there
23 might be a rolling production so it might be two weeks in
24 advance of when the witness is expected to testify. I do think
25 at this -- now, you are getting in the cart before horse stage,

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1 sir, because in your view of the world I'm going to be so
2 impressed by your motions we will never have to deal with that.

3 MR. KLEIN: You are right, your Honor. So I will wait
4 until we win on the motion to dismiss and that won't become an
5 issue.

6 THE COURT: You are exactly right. Thank you.

7 Mr. Rehn, from your perspective, are there other
8 issues we should be addressing? And let me offer an issue to
9 you. From my perspective, I think I would like to, if we are
10 going to be excluding time, I think I would be excluding it
11 through June and not through September. I recognize, and let
12 me say to the parties, that on or about March 29th, the
13 exclusions will start automatically. Still, I'm often asked by
14 the government, for belts and suspenders purposes, to exclude
15 under the catch-all provision through the date of the oral
16 argument just in case something happens and a motion isn't
17 filed and, instead, there are discussions, or if the motion
18 schedule is altered in some way. But, listen. I will listen
19 to the parties in terms of what date the government is going to
20 suggest as the ending date of the exclusion of time and what
21 date the defense is going to consent to if there is one for the
22 exclusion of time. I am just telling you what I am not
23 comfortable doing is excluding through the proposed trial date.
24 That's my only point.

25 Mr. Rehn, do you want to speak with the defense or is

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1 there an application you wish to make?

2 MR. REHN: I think we can make an application.

3 THE COURT: Go ahead.

4 MR. REHN: As we have been discussing there has been
5 voluminous discovery, there is still some discovery that is
6 coming to the defense which they will need time to consider and
7 decide whether to bring any motions and the Court has set a
8 date to hear argument on those motions on June 25. So in light
9 of the defense's need to review the discovery, prepare any
10 motions it wishes to prepare, and then come to the Court to
11 argue those motions, it seems to the government that it would
12 be in the interest of justice and would outweigh the interests
13 of the defendant and the public in speedy trial to exclude time
14 from today until June 25, when the Court hears argument on any
15 defense motions.

16 THE COURT: The defense position, please?

17 MR. KLEIN: No opposition, your Honor.

18 THE COURT: Sir, thank you. May I address this
19 directly to your client.

20 MR. KLEIN: Yes, your Honor.

21 THE COURT: Thank you. Mr. Storm, you are welcome to
22 sit down, sir, and I appreciate it. In our last proceeding we
23 discussed the Speedy Trial Act and there are exclusions under
24 it and you will recall that I excluded time between the last
25 conference and today's conference with the idea that during

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1 that time period discovery would be produced, and you and your
2 attorneys could review discovery and discuss the possibility of
3 motion practice.

4 At that time I made a finding and that finding was
5 that excluding that time period, and in the interest served by
6 excluding that time period, outweighed the interests that you
7 in particular had and that the public in general had, in you
8 getting to trial more quickly. And that is because I wanted
9 you to review the discovery with your attorneys and figure out
10 what you wanted to do. I am now advised that the amount of
11 discovery is more than I could have anticipated, you are still
12 reviewing it, there are substantive important motions that your
13 attorneys wish to bring on your behalf, and they want the
14 opportunity to discuss them with you, to continue to review
15 discovery, understanding that discovery is going to be produced
16 through the end of this year and also to file the best motions
17 that they can.

18 As a general matter, once those motions are filed,
19 time is excluded automatically, but just in the interests of
20 being extra careful I'm going to make the finding that the
21 period of time, excluding the period of time from today's date
22 through the oral argument on the matter which is June 25, that
23 excluding that period of time serves the interests of justice
24 in a way that outweighs any inconvenience to you by having to
25 wait to go to trial, or the public and you having to wait to go

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1 to trial because I really do want you and your attorneys to
2 look at this material, to receive this material, and to make
3 the best motions possible.

4 So, do you understand, sir, that that is why I am
5 excluding time?

6 THE DEFENDANT: Yes, I do, your Honor.

7 THE COURT: Thank you.

8 Mr. Rehn, are there additional things you and your
9 team want to bring to my attention in this proceeding?

10 MR. REHN: No, your Honor.

11 THE COURT: Many thanks.

12 Mr. Klein, anything that you and Ms. Axel would like
13 to bring to my attention in this proceeding?

14 MR. KLEIN: No, your Honor.

15 THE COURT: All right. It doesn't look like I am
16 going to see you all before the holidays. Happy Holidays,
17 Happy New Year to you, and in some manner I look forward to
18 your motions.

19 Thank you very much. We are adjourned.

20 o0o